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day of August, 2004.
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Application of:
Dudek

Serial No.: 09/843,381

Filed: April 25, 2001

For: Process and System for
the Customisation of
Consumer Products

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Atty. Dkt. No.: TS9243 (US)
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Examiner: Fischetti, Joseph A.

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8/9/04
Date

D. Brit Nelson
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Dear Sir:

APPEAL BRIEF

Appellants hereby timely submit this Appeal Brief, in triplicate, with the Notice of Appeal being filed on July 19, 2004 and a Final Office Action dated April 21, 2004. The Commissioner is authorized to charge the requisite fee set forth in 37 C.F.R. § 1.17(c) of \$330 and any other fees deemed necessary to make this document timely from Deposit Account 12-1322/013129.00550.

I. REAL PARTY IN INTEREST

The real party in interest in this appeal is Shell Oil Company, a corporation created and existing under the laws of Delaware, United States, to whom this Application has been assigned.

II. RELATED APPEALS AND INTERFERENCES

There are no related appeals or interferences.

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III. STATUS OF CLAIMS

Claims 1-18 are pending and stand rejected for which the Appellants bring the present appeal to the Board. Claims 1-18 stands rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claim 1 of U.S. Pat. No. 6,598,631 and 6,615,880 in view of *Seo*. *Seo* is also cited by the Examiner to reject the two independent claims 1 and 6 and several dependent claims under 35 U.S.C. § 102(e). *Seo* is further used to reject the claims under 35 U.S.C. § 103(a) in view of *Partyka*, and separately in view of *Whigham*. A copy of the claims on appeal is set forth in the *Appendix*.

IV. STATUS OF AMENDMENT

The Examiner entered the After Final Amendment that withdrew the present consideration of dependent claims 19-25 as a different species, required by the Examiner. The Examiner states that these claims would be reconsidered upon allowance of a generic claim.

V. SUMMARY OF THE INVENTION

In general, the invention provides a unique system for a consumer to fine-tune the creation of a product from a vending machine. Typically, in the cleaning product field, the final product is prepackaged in retail units, shipped to a store or vending machine, and sold in the prepackaged retail unit. (*See, e.g.*, p. 1, l. 19-p. 2, l. 7.) In contrast, the present invention allows the consumer to design a customized product from, for example, a vending machine by directly choosing selectable components having particular desired characteristics to create the customized product. Such aspects are, for example, claimed in independent claims 1 and 6; described on p. 5, ll. 9-23; p. 7, ll.14-21; and p. 15, ll. 7-23; and illustrated, for example, in Fig. 1 as elements 2, 3, 4, 6, and Fig. 2, as elements 10, 12, 14a, 14b, 16a, 16b, 16c. For example, such options can include fragrance, color, antibacterial agents, bleaching agents, agents to prevent the creasing of fabrics, water softeners, and

limescale removers. (*See*, p. 15, ll. 11-13.) The customized product can then be dispensed from the vending machine. (*See, e.g.*, p. 3, ll. 15-24; p. 5, ll. 9-15; p. 7, ll. 14-21; and p. 9, ll. 15-18; and Fig. 2, elements 10, 12.)

The invention represents a change in paradigm in the art, represented by the cited reference *Seo*, that allows the customer to choose the *product* itself, for example, by pressing a button on the vending machine for that product. The *Seo* vending machine is preprogrammed to make a preformulated product with preprogrammed components for the preformulated product.

VI. ISSUES

The issues on appeal are premised on the grounds of rejection set forth in the Final Office Action.

A. Whether claims 1-18 are unpatentable under the judicially created doctrine of obviousness-type double patenting over claim 1 of U.S. Pat. No. 6,598,631 and 6,615,880 in view of *Seo*.

B. Whether independent claims 1 and 6 and dependent claims 2, 3, 8, 14, and 16 are unpatentable under 35 U.S.C. § 102(e) as being anticipated by *Seo*.

C. Whether claims 1-10 are unpatentable under 35 U.S.C. § 103(a) over *Seo* in view of *Partyka*.

D. Whether claims 6-8 and 11-18 are unpatentable under 35 U.S.C. § 103(a) over *Seo* in view of *Whigham*.

VII. GROUPING OF THE CLAIMS

A. For the purposes of the rejection of Claims 1-18 under the judicially created doctrine of obviousness-type double patenting in this appeal:

1. claims 1-2, 6-7, and 14-18 stand or fall together;
2. claim 3 stands or falls by itself;
3. claims 4-5 and 8-10 stand or fall together; and
4. claims 11-13 stand or fall together.

B. For the purposes of the rejection of claims 1, 2, 3, 6, 8, 14, and 16 under 35 U.S.C. § 102(e) are being anticipated by *Seo* in this appeal:

1. claims 1, 3, 6, 14, and 16 stand or fall together;
2. claim 2 stands or falls by itself; and
3. claim 8 stands or falls by itself.

C. For the purposes of the rejection of claims 1-10 under 35 U.S.C. §103(a) over *Seo* in view of *Partyka* in this appeal:

1. claims 1, 3, and 6 stand or fall together;
2. claims 2 and 7 stand or fall together;
3. claims 4, 8, and 10 stand or fall together; and
4. claims 5 and 9 stand or fall together.

D. For the purposes of the rejection of claims 6-8 and 11-18 under 35 U.S.C. §103(a) over *Seo* in view of *Whigham* in this appeal:

1. claims 6, 8, 14, 16, and 17 stand or fall together;
2. claims 7 and 15 stand or fall together;
3. claims 11, 13, and 18 stand or fall together; and
4. claim 12 stands or falls by itself.

VIII. ARGUMENT

A. Whether claims 1-18 are unpatentable under the judicially created doctrine of obviousness-type double patenting over claim 1 of U.S. Pat. No. 6,598,631 and 6,615,880 in view of *Seo*.

The MPEP in section 804 provides the following guidance:

A double patenting rejection of the obviousness-type is “analogous to [a failure to meet] the nonobviousness requirement of 35 U.S.C. 103” except that the patent principally underlying the double patenting rejection is not considered prior art. *In re Braithwaite*, 379 F.2d 594, 154 USPQ 29 (CCPA 1967). Therefore, any analysis employed in an obviousness-type double patenting rejection parallels the guidelines for analysis of a 35 U.S.C. 103 obviousness determination. *In re Braat*, 937 F.2d 589, 19 USPQ2d 1289 (Fed. Cir. 1991); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985). . . .

If the application at issue is the later filed application or both are filed on the same day, only a one-way determination of obviousness is needed in resolving the issue of double patenting, *i.e.*, whether the invention defined in a claim in the application is an obvious variation of the invention defined in a claim in the patent. *See, e.g., In re Berg*, 46 USPQ2d 1226 (Fed. Cir. 1998) (the court applied a one-way test where both applications were filed the same day).

Both cited U.S. Patents were filed on the same day as the present application and therefore only a one-way determination is needed. The ‘631 patent claims a device and an associated container for mixing of one or more concentrates and/or diluents at an interface between a container and a filling head of a vending machine, as follows:

1. A device for mixing of one or more concentrates and/or diluents at an interface between a container and a filling head of a vending machine as the container is filled using said filling head, comprising the combination of:

(i) a filling head component, comprising one or more concentrate and/or diluent inlet tubes, said inlet tubes being in fluid communication with a central chamber, said chamber comprising therein a diverter, said diverter being such that the difference between the diameter of the diverter and that of the surrounding chamber is such that the cross-sectional area therebetween gradually increases in the direction of flow of the filling head component; and

(ii) a component located in a fill aperture of a container, said components being engageable with one another so as to provide a direct path from said filling head to the interior of the container.

There is no teaching, suggestion, or showing in the claim of a consumer being able to *select* different components of a product.

The '880 patent claims a system and process using a vending machine for one or more concentrates to form a product, as follows:

1. A system for the mixing of one or more concentrates to form a product, comprising a vending machine, said vending machine comprising one or more diluent sources and one or more concentrate sources, said diluent and concentrate sources being in fluid communication with one or more mixing chambers, the mixing chamber being adapted to mix the diluent and concentrate sources prior to dispense, the product being selected from cleaning products and detergents, the vending machine further comprising one or more dispense points adapted to dispense the product into a storage container when the storage container is positioned for dispensing from the vending machine.

Here, too, there is no teaching, suggestion, or showing in the claim of a consumer being able to *select* different components.

Seo discloses selecting standardized, formulated products for filling the cup in the vending machine. *Seo* does not teach, show, or suggest any consumer selection of *particular components* of the ultimate product, as explained further under the section 102 and section 103 discussions below. There is no motivation to combine *Seo* with either of the two referenced patents to obtain the present invention of available selections made by a consumer of one or more *components* of the products. Thus, each cited U.S. Patent, alone or in combination with *Seo*, would still not teach, show, or suggest the claimed subject matter of claims 1-2, 6-7, and 14-18.

Regarding claim 3, which recites a reusable container, claim 1 of either U.S. Patent or *Seo*, alone or in combination, does not teach, show, or suggest a reusable container as described and claimed in the present invention.

Regarding claims 4-5 and 8-10, which recite remote means, claim 1 of either U.S. Patent or *Seo*, alone or in combination, does not teach, show, or suggest a remote means for operation of the vending system.

Regarding claim 11-13, which recite a plurality of interfaces, claim 1 of either U.S. Patent or *Seo*, alone or in combination, does not teach, show, or suggest a plurality of interfaces that can be used to select and customise product. The Examiner admits that *Seo* does not teach such aspect in the Office Action and Final Office Action as discussed below in Section VIII.D. under the section 103(a) rejection over *Seo* in view of *Whigham*.

Thus, the rejection of the claims under the judicially created doctrine of obviousness is erroneous.

B. Whether independent claims 1 and 6 and dependent claims 2, 3, 8, 14, and 16 are unpatentable under 35 U.S.C. § 102(e) as being anticipated by *Seo*.

The Examiner states that *Seo* discloses preparing said consumer products according to a selection of product characteristics made by a consumer, optionally reconstituting with one or more other components, and dispensing from a vending system at the point-of-sale.

“A claim is anticipated only if each and every element as set forth in the claims is found, either expressly or inherently described, in a single prior art reference.” *Verdegaal Bros. v. Union Oil Co. of California*, 2 USPQ2d 1051, 1053 (Fed. Cir. 1987); *see also* MPEP § 2131; *In re Schreiber*, 128 F.3d 1473, 1477 (Fed. Cir. 1997).

The Applicant respectfully submits that the Examiner is comparing a mismatch of terms. The Examiner appears to be comparing the *product* selectable in *Seo* to the *component* of the product selectable in the present invention. Simply stated, *Seo* discloses and only discloses selecting the

product itself by a user. The vending machine disclosed in *Seo* then does the rest by supplying programmed ingredients for the product. In stark contrast, the present invention allows a consumer to select the *components* of the product, customizable at the consumer selectable discretion.

Seo illustrates this aspect in Column 3, lines 57-62 and Figure 7: “The product selecting unit 410 disposed with a plurality of buttons corresponding to respective products in the automatic vending machine serves to input a product selection signal to the controller 420 when the buttons are manipulated.” The consumer selects the products. The machine then mixes raw materials to produce a preformulated product chosen by the consumer. In contrast, the present invention allows a consumer to select the *components* of the product, so that the formulation can vary to produce characteristics desired by the consumer.

One can search in vain in *Seo* for any mention or even a hint of a consumer selection of particular *components* of the product. *Seo* is clear and the present invention is clear on the differences. *Seo* offers a choice of a preformulated final *product*. In stark contrast, the present invention allows the consumer to select the particular *components* of the product. The rejection of claims 1, 3, 6, 14, and 16 is erroneous.

Regarding claim 2, the Examiner admits that *Seo* does not teach simultaneous processing in the 35 U.S.C. § 103(a) rejection of claims 1-10 over *Seo* in view of *Partyka* discussed below in Section VIII.C and relies on *Partyka* for such. Yet, claim 2 requires simultaneous multiple customization and dispensing. It is inconsistent to reject claim 2 under section 102(e) as being anticipated by *Seo* in light of such admission. The rejection of claim 2 is erroneous.

Regarding claim 8, the Examiner admits that *Seo* does not teach remote controlling in the 35 U.S.C. § 103(a) rejection of claims 1-10 over *Seo* in view of *Partyka* discussed below in Section VIII.C and relies on *Partyka* for such. Yet, claim 8 requires a vending system to be operated by a

remote means. It is inconsistent to reject claim 8 under section 102(e) as being anticipated by *Seo* in light of such admission. The rejection of claims 8 is erroneous.

C. Whether claims 1-10 are unpatentable under 35 U.S.C. § 103(a) over *Seo* in view of *Partyka*.

1. The stated combination of *Seo* with *Partyka* does not meet the necessary legal requirements.

To properly combine *Seo* with *Partyka*, three basic criteria must be met to establish a *prima facie* case of obviousness, according to the MPEP. There must: be a suggestion or motivation to modify the reference or combine references teachings, be a reasonable expectation of success, and teach or suggest all the claim limitations. (MPEP §§ 2142-2143.) Further, it “is difficult but necessary that the decision maker forget what he or she has been taught . . . about the claimed invention and cast the mind back to the time the invention was made (often as here many years), to occupy the mind of one skilled in the art who is presented only with the references, and who is normally guided by the then-accepted wisdom in the art.” (MPEP § 2141.01, citing *W.L. Gore & Associates, Inc., v. Garlock, Inc.*, 723 F.2d 1540, 220 USPQ 303, 313 (Fed. Cir. 1983), *cert. denied*, 469 U.S. 851 (1984)). “The references must be viewed without the benefit of impermissible hindsight vision afforded by the claimed invention.” MPEP § 2141 (citing *Hodosh v. Block Drug Co., Inc.*, 786 F.2d 1136, 1143 n.5, 229 USPQ 182, 187 n.5 (Fed. Cir. 1986)).

The Federal Circuit has clearly and explicitly held that in order for references to be combined, the references themselves must explicitly teach or suggest the combination as well as the potential benefit which may be derived from such a combination. *In re Fritch*, 23 USPQ2d 1780 (Fed. Cir. 1991); *In re Vaeck*, 20 USPQ2d 1438 (Fed. Cir. 1991); *In re Bond*, 15 USPQ2d 1566 (Fed. Cir. 1990); *In re Dillon*, 13 USPQ2d 1337 (Fed. Cir. 1989); *Pipeline Dehydrators, Inc. v. Southeast*

Pipeline Contractors, Inc., 11 USPQ2d 1375 (Fed. Cir. 1989); *Smith Kline Diagnostics, Inc. v. Helena Laboratories Corp.*, 8 USPQ2d 1468 (Fed. Cir. 1988); *Carella v. Starlight Archery*, 231 USPQ 644 (Fed. Cir. 1986); and *ACS Hospital Systems, Inc. v. Montefiore Hospital*, 221 USPQ 929 (Fed. Cir. 1984).

The Examiner has not identified any teaching or suggestion or any benefit from within *Seo* or *Partyka* for combining the references in the manner suggested by the Examiner. It appears that the Examiner is using impermissible hindsight gained from the present invention to form the basis for combining *Seo* and *Partyka*.

2. The combination of Seo with Partyka yields a different process and system from the present invention.

The Examiner acknowledges that *Seo* does not teach remote controlling or simultaneous ordering. The Examiner relies on *Partyka* to disclose using a remote controller to direct communications to plural vending machines, and able to effect simultaneous processing of plural orders. The Examiner combines *Seo* and *Partyka* to reject the claims.

The rejection is erroneous for the following reasons. *Seo* has been distinguished above. *Partyka* teaches a monitoring system, not an operating or controlling system. It simply does not teach simultaneous processing of the selected components of products or even products. To hold otherwise is only a result of using impermissible hindsight.

Partyka recognizes a problem in the accuracy of data from vending machines caused by monitoring when the vend motor is energized. (Col. 1, line 44-col. 2, line 4.) *Partyka* solves this problem by monitoring when a coin is inserted or charge is indicated and then monitoring for a period the motor/sold out signals to detect which bin corresponds to the motor vending the product

for more accurate results. (Col. 6, lines 16-47.) It uses this information to establish a more accurate service/repair schedule. (Col. 2, lines 5-16.)

The combination of *Seo* with *Partyka* would yield a vending machine of *preformulated products with a more accurate service/repair schedule*. The combination does not yield the claimed invention of claims 1, 3, 6.

Regarding claims 2, 7, which claim simultaneous multiple customization and dispensing, the Examiner admits that *Seo* does not teach such aspect. *Partyka* does not teach, show, or suggest such aspect, either. Thus, the combination of *Seo* with *Partyka* still would not teach, show, or suggest simultaneous processing of the selected components or products.

Regarding claims 4, 8, 10, which claim a remote means of operating the vending system or a vending system adapted to be operated by a remote means, the Examiner admits that *Seo* does not teach such aspect. *Partyka* does not teach, show, or suggest a remote means of operating the vending system. *Partyka* monitors. In contrast, such active operations generally include generally recognized functions, such as activating, customizing, mixing, filling, or other operations, as explicitly stated or implicitly inferred in the present description of the invention, that is, more than simply monitoring.

Claims 5 and 9 claim both aspects of the above, that is, simultaneous multiple customization and dispensing, and a remote means of operating the vending system or a vending system adapted to be operated by a remote means. As discussed above, the combination of *Seo* and *Partyka* does not teach, show, or suggest either aspect, let alone both aspects.

For the above reasons, the rejection of claims 1, 3, and 6; 2 and 7, 4, 8, and 10; and 5 and 9 are erroneous.

D. Whether claims 6-8 and 11-18 are unpatentable under 35 U.S.C. § 103(a) over *Seo* in view of *Whigham*.

In making this rejection, the Examiner acknowledges that *Seo* is silent as to plural interfaces being used to selectively operate one or more plural systems. The Examiner relies on *Whigham* to disclose plural interfaces that can operate in response to signals from any cell phone (“plural interfaces” per the Examiner). The Examiner combines *Seo* and *Whigham* to include the plural interface feature with the motivation being to allow the user access to one of many vending machines.

The combination does not teach, show, or suggest the present invention. First, *Seo* has been distinguished above.

Second, *Whigham* teaches one consumer, one vending machine, and one cellular telephone to order from the vending machine—there are no plural interfaces or plural systems. *Whigham* teaches one consumer ordering from one vending machine one product at a time. The Examiner again appears to be using impermissible hindsight, given the present invention’s disclosure. Further, *Whigham* does not teach, show, or suggest ordering *components* of products, as required by the claims.

Regarding claims 6, 8, 14, 16, and 17, no plural interfaces are claimed and *Whigham* does not teach, show, or suggest ordering *components* of products. Thus, *Whigham* does not apply even by the Examiner’s rationale. *Seo* has been distinguished above and does not teach, show, or suggest the subject matter of claim 6 or its dependent claims. Thus, the combination of *Seo* with *Whigham* does not teach show or suggest the subject matter of the claims 6, 8, 14, 16, and 17 and the rejection is erroneous.

Regarding claims 7 and 15, which claim simultaneous multiple customization and dispensing, the Examiner admits *Seo* does not teach such aspect, as discussed above. *Whigham* does not teach such aspect, either, and the Examiner does not cite *Whigham* for such aspect. Thus, the combination of *Seo* with *Whigham* does not teach show or suggest the subject matter of the claims 7 and 15.

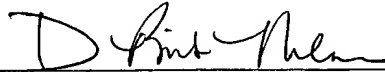
Regarding claims 11, 13, and 18, which claim a plurality of interfaces that can be used to select and customize product, the Examiner admits that *Seo* does not teach such aspect. *Whigham* teaches one consumer, one vending machine, and one cellular telephone to order from the vending machine, not a plurality of interfaces as used in the present invention. Thus, the combination of *Seo* with *Whigham* does not teach, show, or suggest the subject matter of claims 11, 13, and 18.

Regarding claim 12, which claims both simultaneous multiple customization and dispensing and a plurality of interfaces that can be used to select and customize product, the Examiner admits that *Seo* does not teach either aspect. *Whigham* does not teach simultaneous multiple customization, and the Examiner does not cite *Whigham* for such aspect. *Whigham* teaches one consumer, one vending machine, and one cellular telephone to order from the vending machine, not a plurality of interfaces as used in the present invention. Thus, the combination of *Seo* with *Whigham* does not teach, show, or suggest the subject matter of claim 12.

Thus, the combination of *Seo* with *Whigham* is deficient and does not teach, show, or suggest the present invention and the rejection of each set of claims discussed above is erroneous.

CONCLUSION

In conclusion, the cited references, alone or in combination, do not teach, show, or suggest the present invention. Therefore, it is believed that the rejections are erroneous and the claims are in condition for allowance. A decision of the Board consistent with this showing is earnestly requested.



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IX. APPENDIX

Pending Claims

1. (Previously presented) A process for the customisation of consumer products, which comprises the steps of:
 - (a) preparing said customisable consumer products according to available selections made by a consumer of one or more components of said consumer products having product characteristics chosen by the consumer,
 - (b) optionally reconstituting said components with one or more other components, and
 - (c) dispensing from a vending system at a point-of-sale of said consumer products.
2. (Original) The process according to Claim 1, wherein said process allows for the simultaneous multiple customisation, optional reconstitution with one or more other components and dispensing of consumer products.
3. (Original) The process according to Claim 1, wherein the consumer product is dispensed into a reusable storage container.
4. (Original) The process according to Claim 1, wherein the process includes a remote means of operating the vending system.
5. (Original) The process according to Claim 2, wherein the process includes a remote means of operating the vending system.
6. (Previously presented) A vending system for the customisation of consumer products, wherein said customisable consumer products are prepared according to available selections made by

a consumer of one or more components of said consumer products having product characteristics chosen by the consumer, said components being optionally reconstituted with one or more other components forming said customised consumer products and dispensed from said vending system at the point-of-sale.

7. (Original) The vending system according to Claim 6, wherein said vending system allows for the simultaneous multiple customisation, optional reconstitution with one or more other components and dispensing of consumer products.

8. (Previously presented) The vending system according to Claim 6, wherein the vending system is adapted to be operated by a remote means.

9. (Previously presented) The vending system according to Claim 7, wherein the vending system is adapted to be operated by a remote means.

10. (Previously presented) The vending system according to Claim 8, wherein the remote means comprises an electronic communicative device.

11. (Previously presented) The vending system according to Claim 6, wherein said vending system is connected to a plurality of interfaces capable of being connected to one or more further vending systems, such that one or more of the interfaces may be used to select and customise product according to availability of said one or more interfaces and one or more dispense points of the one or more further vending systems being used to dispense product according to dispense loading at said vending systems.

12. (Previously presented) The vending system according to Claim 7, wherein said vending system is connected to a plurality of interfaces capable of being connected to one or more further vending systems, such that one or more of the interfaces may be used to select and customise product according to availability of said one or more interfaces and one or more dispense points of the one or more further vending systems being used to dispense product according to dispense loading at said vending systems.

13. (Previously presented) The vending system according to Claim 8, wherein said vending system is connected to a plurality of interfaces capable of being connected to one or more further vending systems, such that one or more of the interfaces may be used to select and customise product according to availability of said one or more interfaces and one or more dispense points of the one or more further vending systems being used to dispense product according to dispense loading at said vending systems.

14. (Previously presented) The vending system according to Claim 6, wherein said vending system is adapted to use a batch process for handling product orders.

15. (Previously presented) The vending system according to Claim 7, wherein said vending system is adapted to use a batch process for handling product orders.

16. (Previously presented) The vending system according to Claim 8, wherein said vending system is adapted to use a batch process for handling product orders.

17. (Previously presented) The vending system according to Claim 10, wherein said vending system is adapted to use a batch process for handling product orders.

18. (Previously presented) The vending system according to Claim 11, wherein said vending system is adapted to use a batch process for handling product orders.
19. (Withdrawn) The vending system according to Claim 6, wherein said vending system is adapted to use a parallel process for handling product orders.
20. (Withdrawn) The vending system according to Claim 7, wherein said vending system is adapted to use a parallel process for handling product orders.
21. (Withdrawn) The vending system according to Claim 8, wherein said vending system is adapted to use a parallel process for handling product orders.
22. (Withdrawn) The vending system according to Claim 10, wherein said vending system is adapted to use a parallel process for handling product orders.
23. (Withdrawn) The vending system according to Claim 11, wherein said vending system is adapted to use a parallel process for handling product orders.
24. (Withdrawn) The vending system according to Claim 12, wherein said vending system is adapted to use a parallel process for handling product orders.
25. (Withdrawn) The vending system according to Claim 13, wherein said vending system is adapted to use a parallel process for handling product orders.